United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 12875
Civil

ERNEST B. BROWNELL,
Appellant,

vs.

FRED M. MANNING, INC.,
Appellee.

Appeal from the United States District Court
for the District of Montana

APPELLEE'S BRIEF

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STATEMENT OF THE CASE

This appeal presents two related questions:

(1) Is there evidence to support the court's findings that plaintiff was guilty of negligence in any or all of the particulars specified in the decision and the findings?

(2) If so, was such negligence a proximate cause of the collision?

The analysis of the evidence in Appellant's Brief, in support of counsel's contention that the court erred in its findings, is very meager. They rely primarily upon (1) their contention that the court applied the "wrong legal standards to the conduct of plaintiff" (App. Brief p. 12), inferring that the court may have confused this case with the so-called Hennessy cases; and (2) their suggestion of doubt in the mind of the trial court with respect to the correctness of his decision. These contentions and

inferences were not included in either the Points Relied On For Reversal (R. p. 45) or the Specifications of Error (App. Brief p. 10). Nevertheless we shall discuss them later in this brief.

STATEMENT OF FACTS

The Statement of Facts in Appellant's Brief is substantially correct although incomplete. In our argument we shall refer in detail to those facts which sustain the court's findings.

We question specifically two statements in appellant's Statement of Facts:

(1) Appellant states that "the other vehicle was some forty feet north of the Martin Lamb driveway when he (plaintiff) first started to pay attention to it." (App. Brief p. 4). Instead the defendant's truck was at the irrigation lateral, 425 feet from the bridge, when the plaintiff first paid particular attention to it. The following is taken from plaintiff's testimony:

> "Mr. Lush: We have stipulated it is approximately 425 feet from the north edge of the bridge to the high point of the road which was the irrigation lateral, your Honor.
>
> "The Court: Where he first noticed the approaching vehicle.
>
> "Mr. Lush: Where he first paid particular attention to it, your Honor, yes.
>
> "Q. When you first observed the vehicle approaching from the other direction when you first started to pay attention to it what called your attention particularly to it?
>
> "A. His trailer jogging out into the highway into my lane of highway.
>
> "Q. And when you observed the trailer jogging out into the highway, I believe you said, what did you do?
>
> "A. I applied the brakes at that time." (R. pp. 60-61).

(2) The final paragraph of the statement referring to the so-called Hennessy cases is not properly included in the Statement of Facts.

ARGUMENT

FACTS SHOWING NEGLIGENCE OF PLAINTIFF

Four eye-witnesses testified at the trial, —the plaintiff, Brownell, defendant's driver, Hawkins, and two passengers in plaintiff's bus, Whiston and Dees. Plaintiff relied primarily upon their testimony to establish negligence on the part of Hawkins. The same testimony, together with the evidence of the icy condition of the highway, sustains the court's findings that plaintiff was also negligent. We shall summarize and discuss briefly the evidence which, when considered as a whole, not only supports the findings of the trial court, but permits no other conclusion than that plaintiff was guilty of negligence which was a proximate cause of the collision.

1. Plaintiff Drove Nine Miles Over Dangerous, Icy Highway to Point of Collision.

The court found "that the roadway was covered with snow and ice all the way north from Worland to the bridge and beyond; that both drivers knew there was snow and ice and slippery conditions underneath their vehicles; and that plaintiff had known these conditions for a distance of nine miles south of the bridge." (Finding V. R. p. 3). Does the testimony sustain this finding?

The plaintiff himself testified that "it was ice with snow on top" (R. p. 86); and that the road was very icy and very slick from Worland clear up to the scene of the accident (R. p. 88). The County Sheriff, John S. Nicola, testified the road condition coming north from Worland was "very slippery" (R. p. 117); he came near to piling up two or three times enroute from Worland to the scene of the accident; he had skidded (R. p.

156). The road was "sort of corrugated." (R. p. 157). When he skidded he made a side motion of three or four feet. In some portions of the road the snow was packed three inches deep (R. p. 157). Mr. Whiston, another passenger in the bus, testified that it was pretty solid ice (R. p. 192). Martin Lamb stated "It was very slippery" (R. p. 223); that he did not think he traveled over twenty or twenty-five miles an hour approaching the scene of the accident from the south (the route over which plaintiff had traveled); and that he didn't measure or pace the distances at the scene of the accident on the day of the accident because it was so slick on the roadway at that place (R. p. 223).

Fred Wickam, a State Highway Patrolman, testified that he drove from five miles south of Thermopolis to the scene of the accident after being notified by radio of the happening. He found ice from a point just south of Worland to the scene of the accident. He stated "Well, I would call it solid ice across the road." (R. p. 266).

Keith Ward, a State Highway Patrolman, who came from Basin to the accident and then went to Worland after the accident, described the roadway from the scene of the accident to Worland as: "Well, there was hard packed snow from the scene of the accident right through into Worland. It was hard packed snow and it was rough and slippery and dangerous road to travel, especially with an outfit like I had." (R. p. 402). He was driving a panel truck and stated that he travelled that road at a speed of from twenty-five to thirty miles per hour because of the road conditions (R. p. 402). This testimony was corroborated substantially by Dr. R. B. Walker (R. p. 295), O. R. Booker (R. p. 305) and A. J. Prosser (R. p. 341).

The evidence of all of the witnesses for both plaintiff and defendant concur that the road between Worland and the scene of the accident was coated with ice covered by packed snow up to three inches thick, which was rough, slippery and bumpy. Its condition was such as to warn travellers thereon, at least all of the distance from Worland to the scene of the accident, that they must drive slowly and be prepared to avoid skids, not only of their own vehicles, but also of any approaching vehicles.

2. Drivers Could See Danger Ahead When Vehicles Were 850 Feet to 1000 Feet Apart and Equi-Distant from Narrow Appearing Bridge.

Counsel for appellant question the court's finding that both drivers could see the danger ahead when 850 to 1000 feet apart and should have slowed down and stopped before colliding with each other. They argue that "when the respective vehicles first came into view of each other they were at the most 830 feet apart" and that there "was nothing at that moment which indicated to either driver that there was danger ahead." (App. Brief pp. 13-14). They arrive at 830 feet as the maximum distance by taking the distance from the rise in the road at the irrigation lateral to the bridge, 425 feet, deducting therefrom ten feet from the bridge to the point of collision, and assuming that the bus was equi-distant from that point when the drivers first came into view of each other. They disregard the testimony which shows that for even a greater distance plaintiff could have discerned the danger, had he maintained a proper lookout.

It is conceded that the irrigation lateral was approximately 425 feet from the north end of the bridge. The plaintiff Brownell testified that he "first paid particular attention to the truck" at that point and that the trailer of the truck there jogged "out

into the highway into my lane of travel." (R. pp. 60-61). He also testified that he could see clearly for one-half mile (R. p. 92).

Hawkins testified that he was possibly three blocks from the bus when he first saw it; that he was along by the first trees at the irrigation lateral; and that he did not "recall" seeing the bus before that (R. pp. 374-5).

On cross-examination plaintiff's counsel developed the fact that Hawkins' eyes would be some seven or eight feet above the pavement when he was sitting in the cab, (R. pp. 376-7) and interrogated Hawkins further as follows:

"Q. How high is that rise?

"A. I couldn't say. I know there is a rise there in the road.

"Q. Are you familiar with maps? If this map represents one foot of rise here, that is one foot rise for each one of those little blocks, then from the lowest point back here to the top of that rise we actually have only slightly over four feet, isn't that true? Doesn't the map show just slightly over four foot rise between this spot back here and the high point there?

"A. I don't know as to that, what the heighth would be.

"Q. Well this is drawn to scale, is it not? This scale is one inch equals ten feet on a horizontal, and these all represent one foot. So the lowest point on the road back here visible on this map was not as low as the heighth your head was above the pavement, was it, if your head was seven feet above the pavement?

"A. I don't know.

"Q. From the low point visible on this map you could always look over the top of that hill and see the road ahead, could you not? Well isn't that the true fact with reference to the road—never mind the map—couldn't you always see ahead over the top of that hill and see the road and the character of the road ahead of you? There isn't any place visible on this map you couldn't have looked ahead of you and seen the road was covered with snow there over the top of that hump?

"A. I could see the road was covered with snow the other side of the bridge." (R. pp. 379-80).

Counsel's questions effectively suggest that both drivers could, if keeping a proper lookout, see the other vehicle for a greater distance than the 415 feet from the lateral to the point of collision; and the court called attention in its decision to the fact that "the heads of both drivers were at an elevation of about seven feet above the roadway so that each had a clear and unobstructed view." (R. p. 24). Moreover, the court could well find that at the point of impact the plaintiff's bus was traveling faster than the defendant's truck.

Whiston testified three different times that the two vehicles were about equi-distant from the bridge (R. pp. 194, 198).

Dees admitted that he had testified in a prior deposition that it looked like the two vehicles might pass on the bridge if he (Hawkins) had kept coming, (R. p. 237) and that if Hawkins hadn't slowed down they would have passed on the bridge.

Wickam, the highway patrolman, testified that on the evening of the accident plaintiff made the statement that he was trying to slow down because he didn't want to meet the truck on the bridge (R. p. 267). This is confirmed by the written report of the two highway patrolmen, sheriff and under-sheriff from their combined investigation (Pl. Ex. 10, Deft. Ex. 18, R. pp. 404, 406).

Since the distance from the lateral to the north end of the bridge was 425 feet and the bridge was twenty feet long, the distance between the two vehicles would be at least 850 feet if they were equi-distant from the bridge and neither driver had sighted the other until the truck reached the lateral. It is clear, however, from the foregoing evidence that the court could properly find that each driver could see the other before the truck reached the lateral.

The court found "that both drivers were admittedly aware that they should avoid a meeting on the bridge, which appeared to be narrow because of a slight angle with the roadway." (Finding VII, R. p. 33).

Keith Ward, the highway patrolman, described the bridge as follows:

> "A. Well it has the impression of a narrow bridge due to the fact there's a turn slightly and the road coming south goes straight up approximately to the bridge. The bridge sets slightly with the north end to the east. It has the look of a narrow bridge due to being set at an angle to the highway." (R. pp. 408-09).

Hawkins testified to the same effect (R. p. 363. See also Exhibit 9).

All of the testimony leads inescapably to the court's findings that "both drivers had a clear and unobstructed view of each other as they approached the bridge"; that "the thought that they might pass each other at or on the bridge was in the minds of both drivers"; that "both drivers could see the danger ahead when 850 to 1000 feet apart, and both should have slowed down and stopped before colliding with each other." (Findings IV and VI, R. p. 33).

3. Plaintiff Must Have Seen Threatening Situation and Possible Danger of Meeting on Bridge.

(a) Plaintiff's Observation of Skids or Jogs of Defendant's Truck.

The contention of appellant's counsel that the "first possible indication of any danger was when the truck skidded" (App. Brief p. 15) ignores the icy and dangerous condition of the highway, plaintiff's speed on that icy road, and the fact that both drivers anticipated a meeting on the bridge. Moreover,

counsel are mistaken in placing the point of the first skid at 40 feet north of the Martin Lamb driveway. It is clear from plaintiff's own testimony that this occurred when the truck was at the irrigation lateral, 425 feet from the bridge (R. pp. 60-61). Plaintiff testified that the second jog was about at the Martin Lamb driveway (250 feet from the center of the bridge).

From Brownell's direct examination:

> "Q. And will you point out to the court at approximately at what spot it made the second jog out into the highway?
> "A. I would say about at the Lamb driveway.
> "Q. And what was the next move that was made by the approaching vehicle?
> "A. It straightened back up almost and then went into another jog and it never came out of it.
> "The Court: Went into another what?
> "Maybe I should say skid, your Honor.
> "Q. (By Mr. Lush): And was that the third skid that you observed that vehicle making?
> "A. Yes." (R. pp. 61-62).

The plaintiff further testified that he realized the truck was "completely out of control" when it was about 200 feet north of the bridge (R. p. 68).

(b) Distances From Bridge and Point of Impact.

It is true, as set forth in appellant's statement of facts, that plaintiff testified that he first started to pay attention to the other vehicle when he was almost to the Sam Piel driveway (R. p. 57) and that the center of this driveway is 165 feet south of the center of the bridge. This testimony and like testimony of others of plaintiff's witnesses is inconsistent with prior testimony of the same witnesses and with the physical facts. Plaintiff has also testified that when he first paid attention to the truck, it was at the irrigation lateral, 425 feet from the north edge

of the bridge (R. p. 60-61). If both of these estimates were correct, the truck was 415 feet from the point of impact and the bus 185 feet. In order to collide where they did, the truck would have had to travel over twice the distance of the bus, although the two vehicles were traveling at approximately the same speed when the drivers came into sight of each other. This is manifestly impossible.

Moreover, plaintiff's counsel overlooked in this connection a very significant bit of testimony of plaintiff himself. While it is true he testified at the trial that he was at the Piel driveway when the truck was at the lateral and made its first swerve, he also testified that after the first swerve he could have pulled off at the Piel driveway had he known the truck was going to get out of control (R. pp. 67-8). Obviously he must have been some distance south of the Piel driveway when he observed this swerve, which occurred near the irrigation lateral, if, as he admits himself, he could have turned into the Piel driveway after observing the swerve.

Equally implausible is plaintiff's testimony that when he observed the truck out of control 200 feet north of the bridge, his bus was 10 or 15 feet south of the bridge (R. p. 68). If this were true, then the truck skidded a distance of over 200 feet while the bus traveled 40 to 45 feet at a speed estimated by plaintiff and his own witnesses at 15 to 25 miles an hour. (See page 14 of this brief). If plaintiff's estimates of distance and speed are correct, the truck would have been skidding 60 to 100 miles per hour.

Plaintiff's testimony on this point at a prior deposition is more plausible and coincides more fully with the true facts. He then testified that when he was approximately 200 feet south

of the bridge, the two vehicles were 400 to 450 feet apart (R. p. 93). The actual estimates of distances are not too important. Errors in such estimates are easily understandable. It is significant, however, that in this deposition the plaintiff had the two vehicles approximately the same distance from the bridge, which coincides with the testimony of Hawkins, Whiston and Dees.

Taking the testimony of plaintiff himself which is most consistent with the physical facts, it is clear that plaintiff first observed defendant's truck jog into plaintiff's lane of the highway when the truck was at the irrigation lateral, 425 feet from the bridge, again when the truck was at the Martin Lamb driveway, 250 feet from the bridge, and a third time at some point between this driveway and the bridge; that plaintiff admits that he realized the truck was "completely out of control" when it was about 200 feet from the bridge; that plaintiff's bus must have then been about the same distance from the bridge. These facts, together with the admitted icy and dangerous condition of the highway, sustain the court's finding that "plaintiff must have seen the threatening situation and the possible danger of meeting on the bridge, especially when he observed the trouble defendant Hawkins was having with his truck and trailer." (Finding VII, R. p. 34).

4. Plaintiff Driving at Excessive Speed in View of Dangerous Condition of Highway.

The court found that plaintiff was traveling from 35 to 40 miles per hour and defendant's truck from 40 to 45 miles per hour when the drivers sighted each other and were from 850 to 1000 feet apart. (In the court's decision, the speed of defendant's truck was given as 40 to 45 miles per hour (R. p.

28), but through a typographical error this appears as 40 to 50 miles per hour in the findings.) (R. p. 35). There is ample evidence to support the court's decision. In a prior deposition Brownell had estimated his own speed at 35 to 40 miles per hour (R. p. 88). At the trial he estimated Hawkins' speed at 50 miles per hour (R. p. 84). Hawkins estimated his own speed at 35 miles per hour when he first observed plaintiff's bus (R. p. 363). He testified that prior to going over the hill he might have been going from 40 to 45 miles per hour (R. p. 380-1) and could not have gone over 45 miles per hour. Hawkins testified that the bus was traveling at about the same rate of speed as the truck (R. p. 363-4). Whiston had testified in a deposition that he estimated the two vehicles were about the same distance from the bridge and were traveling at about the same rate of speed (R. p. 194). He realized the roads were slick, his wife was nervous, and he had looked at the speedometer three or four times between Worland and the scene of the accident. When he looked about the time he first sighted the truck the bus was traveling between 30 and 35 miles per hour (R. p. 187). Dees estimated the speed of the bus at the Piel driveway at 35 miles per hour. He first testified that the truck was traveling about 35 miles per hour (R. p. 238), but later modified his testimony to say that he could not tell and that it could have been 35 or 45 or 50.

It is a reasonable inference from all of the testimony that the two vehicles were traveling at about the same rate of speed as the drivers came into sight of each other.

All of the witnesses agree that the roadway was covered with snow and ice all the way from Worland to the scene of the accident, a distance of nine miles, over which plaintiff had

driven. There is a conflict in the testimony with respect to the condition of the highway north of the accident over which Hawkins had driven. Plaintiff alleged in his complaint that Hawkins "negligently operated said truck at an excessive and dangerous rate of speed" (R. p. 5), and this was one of the acts of negligence relied upon by plaintiff.

Four witnesses, Walker, Booker, Dolezal and Ward, the highway patrolman, traveled the highway both north and south of the scene of the accident within an hour or two after its occurrence. All of them testified with respect to their own speeds, both north and south of the accident. The following parallel columns are enlightening, particularly in view of plaintiff's contention that Hawkins' speed was dangerous and excessive, but that the court erred in finding that plaintiff also was traveling at an excessive rate of speed:

WITNESS	SPEED NORTH OF ACCIDENT	SPEED SOUTH OF ACCIDENT
Walker	Traveled "75 miles or better" (R. p. 292) "75 to 80," which he considered safe (R. p. 294)	35 to 40 (R. p. 296)
Booker	50 to 60 (R. p. 303)	35 to 40 (R. p. 305)
Dolezal	50 to 60, considered 60 safe speed (R. p. 311)	Slower, 50 to 60 would not be safe (R. p. 311)
Ward	"60 or better (R. p. 395) This was safe speed (R. p. 403)	"I don't think I exceeded 30 miles an hour, 25 the majority of the time. (R. p. 402)

The average speed actually traveled by these four witnesses north of the accident (the road over which Hawkins had traveled) was 20 to 25 miles faster than the speed they actually

traveled south of the accident (the road over which plaintiff had traveled). The same witnesses estimated the safe speed north of the accident from 20 to 25 miles per hour greater than south of the accident.

Yet plaintiff is in the position of contending that Hawkins' speed was "dangerous and excessive" but questioning the court's finding that plaintiff was driving "at an excessive rate of speed in view of the hazards which existed by reason of the slippery condition of the highway." (Finding XI, R. p. 35.) Clearly, if there was any basis for the court's finding that defendant's driver Hawkins was negligent in travelling at an excessive speed, the court was fully justified in finding that the speed of plaintiff's bus was also excessive and dangerous.

5. Plaintiff's Speed at Point of Impact was Proof of His Negligence.

Even more significant in establishing plaintiff's negligence is the testimony with respect to the speed of plaintiff's bus at and near the point of impact.

(a) Speed at Point of Impact.

Plaintiff himself estimated the speed at 15 miles an hour at the point of impact (R. p. 64-5). Dees estimated the speed at point of impact at 20 to 25 miles an hour (R. p. 229). Whiston testified: "It seemed to me shortly before the impact the speedometer reading was around 20." (R. p. 187). He had testified at a prior deposition: "The last time I looked it was 30 miles, which was just before the bus got to the bridge I would say." (R. p. 193).

(b) Speed and Failure to Slow Down or Stop.

In other words, under the testimony of plaintiff's own witnesses the bus was still traveling from 15 to 25 miles an hour

at the point of impact. Under Whiston's testimony at his deposition it had been traveling 30 miles per hour just before it reached the bridge. Plaintiff concedes that he observed defendant's truck make the first swerve to the east side of the highway near the irrigation lateral, 425 feet from the bridge (when plaintiff must have been at least 850 feet away). He testified that he realized defendant's truck was "completely out of control" when it was about 200 feet north of the bridge (R. p. 68) (when plaintiff must have been about 400 feet away). Obviously plaintiff was traveling too fast to stop before the vehicles collided. Plaintiff finds himself in this dilemma: either he was traveling too fast when he first observed defendant's truck swerve at the irrigation lateral and again when it went out of control, or he failed to exercise ordinary care in slowing down his vehicle after observing the swerve and the truck in a position of peril.

(c) Stopping Distance for Bus.

Plaintiff testified as follows with respect to the distance within which he could stop his bus going at a speed of 35 to 40 miles per hour on the roads as they were approaching the scene of the accident:

> "Q. Would you state your, from your experience how far, what distance rather you would have had to travel with your bus going at the speed of 35 to 40 miles an hour taking into consideration the roads as you saw them that day before you could bring it to a stop?
> "A. About 250 feet.
> "Q. Wouldn't that be nearer 300 feet?
> "A. That is just an estimate.
> "Q. How? A. That is just an estimate.
> "Q. Well, of course it would be an estimate but wouldn't that be using the best braking and ideal braking situation, or fanning them as truckers call it, and bringing it to a stop on that icy road?

"A. You mean it would be closer to 300 feet?

"Q. Yes.

"A. I wouldn't say so. I estimated it 250 feet.

"Q. How far did you travel to bring it down from a speed of 35 to 40 miles an hour to a speed of 15 miles an hour, that is, your bus traveling on that icy road?

"A. Well, I suppose about 180 feet.

"Q. The way you brake it down you would have to roll about 180 feet to get your speed down from 35 miles you were going down to 15 miles an hour?

"A. Yes.

"Q. That would be your best judgment and how much faster would you have had to gone to completely stop it?

"A. About 50 feet.

"Q. And isn't it a fact that the snow and conditions interfered to some extent with your vision?

"A. Well very little; you could see half a mile clearly." (R. pp. 91-92).

Whether plaintiff could in fact stop within 250 feet is immaterial. If, as he himself testified, he could have stopped in that distance, obviously he was negligent in failing to do so. After all, in a distance which must have been about 425 feet, under his own testimony plaintiff reduced his speed from 30 to 35 miles an hour to 15 miles an hour. Under the testimony of Whiston and Dees he reduced from 30 to 35 miles down to 20 to 25 miles an hour. Again plaintiff finds himself in this dilemma: if plaintiff was unable to reduce his speed any more than that in the distance so traveled, whether 200 or 425 feet, he was going too fast under the icy condition of the highway. If he could have reduced his speed and brought his bus to a stop and failed to do so, he was equally negligent.

(d) Application of Brakes and Failure to Slow Down or Stop.

Plaintiff testified that he first applied his brakes when the truck was at the lateral 425 feet from the bridge (R. p. 61). Whiston could not tell whether an application of the brakes was

made, testifying, "all I knew the bus was slowing down but whether he was using compression or brakes I couldn't tell." (R. p. 187). Dees likewise could not tell whether plaintiff applied the brakes (R. p. 228). But this much is certain: the bus was still traveling 15 to 25 miles an hour at the point of impact. Plaintiff again faces the same dilemma: if he first applied his brakes when the two vehicles were about 850 feet apart, then he was either traveling too fast in view of the icy condition of the highway or he did not exercise ordinary care in slowing down, when, after traveling some 425 feet, he was still going 15 to 25 miles an hour. Even after he observed the truck completely out of control approximately 200 feet north of the bridge and when he must have been at least 200 feet south of the point of impact, he was still traveling too fast in view of the icy condition of the highway or he did not exercise ordinary care in slowing down or stopping, because he was still going from 15 to 25 miles an hour after traveling the intervening 200 feet.

6. Plaintiff Could Have Turned Off at Piel Driveway.

The court found that both drivers were familiar with the highway and could see turnouts thereon and could have avoided the collision by using them (R. p. 26).

Plaintiff conceded that had he realized defendant's truck was going to get out of control he could have pulled off at the Piel driveway. We quote his testimony on this point:

> "Q. After the first swerve that was made by the truck would you have had an opportunity to get off the road or to go some place to avoid the oncoming truck?
> "A. After the first swerve?
> "Q. Yes.
> "A. It is possible if I had realized that he was going

to get out of control that I could have pulled off right at the Piel driveway, however, I would have been taking a chance of still going into that drainage ditch." (R. pp. 67-8).

Plaintiff's counsel argue that there was no duty on the part of plaintiff to act at that point. There can be no question, however, that he had already observed the truck swerve to plaintiff's side of the highway. He knew the icy and dangerous condition of the road. As the court has found, he must "have seen the threatening situation and the possible danger of meeting on the bridge, especially when he observed the trouble defendant Hawkins was having with his truck and trailer." (R. p. 34) Instead of turning off at the Piel driveway, he risked the consequences of continuing down the highway and failed to slow down and stop, either because he was unable to do so by reason of excessive speed or because he did not take the proper action to bring his vehicle to a stop. In either event he did not have his vehicle under proper control in view of the icy and dangerous condition of the highway.

7. Foregoing Facts Sustain Findings of Negligence on Part of Plaintiff.

The physical facts and testimony of the witnesses show clearly that either plaintiff's speed was excessive in view of the icy and dangerous condition of the highway, or that plaintiff did not exercise ordinary care to slow down and stop when he observed the other vehicle in danger. If he could not stop or reduce his speed to less than 15 to 25 miles per hour in the 425 feet he traveled after observing the first swerve of the truck and applying his brakes, or even the 200 feet he traveled after realizing the truck was completely out of control, then his speed was excessive. If he could have stopped and failed

to do so, then he either failed to maintain a proper lookout or failed to have his vehicle under proper control. Actually, as the court has found, a combination of negligence in all of these particulars was a contributing and proximate cause of the resulting collision. The record not only contains substantial evidence to support the court's findings of negligence, but we submit impels such findings.

PROXIMATE CAUSE

Appellant's counsel contend that even though the court might find that plaintiff was negligent, such negligence was not a proximate cause of the resulting collision. In support of this contention they rely upon the Wyoming case of *O'Mally v. Eagan,* 43 Wyo. 233, 2 P. (2d) 1063, and the textbooks and decisions therein cited. They overlook entirely the more recent and pertinent Wyoming case of *Pierce v. Bean*, 57 Wyo. 189, 115 P. (2d) 660.

A careful analysis of the decision in *O'Mally v. Eagan*, however, does not sustain plaintiff's contention, due to the total dissimilarity of facts. In the Eagan case, a car driven by Eagan, in which plaintiff was riding, was on the wrong side of the road. The defendant testified that he supposed Eagan would turn to his own side of the road until he "was within 50 feet from Eagan, when he realized the latter would not turn out." The road was 24 feet wide, with pavement thereon 19 and one half feet in width. That accident was in June and there is no suggestion in the decision of any dangerous condition of the highway. It is true the court held under this state of facts that the speed of the defendant was not the proximate cause of that accident. Nevertheless the court did recognize that in a proper

case the speed and other acts of negligence of the driver of a vehicle on the right side of the road might well be a proximate cause of the accident. In that connection the court said:

> "Something more must appear in order that it may be said to have contributed to the accident, as, for instance, the duty to stop, the inability to do so by reason of the excessive speed, and that, had defendant stopped, the accident could have been avoided." (p. 1068)

Such a case was the subsequent Wyoming case of *Pierce v. Bean* (1941), 57 Wyo. 189, 115 P. (2d) 660, where the plaintiff, who was traveling south on a main highway, collided with defendant's car, which had entered the highway from a side road to the east. In affirming a judgment based upon the trial court's finding that both plaintiff and defendant were negligent, the Supreme Court said:

> "The accident occurred about noon on a clear, cold, windy day. The Lincoln highway, which is oil-surfaced for the width of 21 feet, was at the time covered with a sheet of ice, and as stated by plaintiff and other witnesses, was 'slippery and very dangerous.' A state highway patrolman testified, without objection that a speed greater than 20 miles an hour was not safe. From a point about 250 feet north of the junction, the highway toward the junction ran down a hill of seven per cent grade. Plaintiff's truck with its load weighed 8,000 pounds, and there were no chains on the wheels. Plaintiff testified that when he was about 1000 feet from the junction he saw the coupe on the side road, and when about 150 feet from the junction saw that the coupe was being driven onto the highway. He testified also that when he saw the coupe enter the highway at the junction, 'the only thing I could do was to take to the right of the road and try to avoid a crash. * * * There was no opportunity to stop in that distance whatsoever under the conditions of the road * * * If I had applied the brakes, I would have skidded straight ahead into the man * * *. It would have been a matter of impossibility for me to have controlled the front wheels of my truck in any di-

rection.' Estimates of the speed at which plaintiff was driving differed. Plaintiff himself testified first that his speed was 'approximately twenty miles an hour.' Later he said it was 'between twenty and thirty miles an hour.' and still later that at no time was over 25 miles an hour 'for the simple reason that it was impossible.' A witness who was driving another truck in sight of and following plaintiff, testified that plaintiff was driving at the rate of 25 miles an hour. It is not necessary to refer to other evidence on this point. We think the trial judge may reasonably have believed that plaintiff was traveling at a speed of at least 25 miles an hour. The travel surface was ice, the grade descending, the vehicle without chains, the driver unable to stop or slow down when he saw the coupe at the junction ahead. **We hold that the trial judge was justified in deciding that a proximate cause of the collision was plaintiff's negligence in driving at a speed that was not reasonable and proper under the conditions."** (p. 661) (Emphasis supplied).

In the case of *O'Mally v. Eagan,* the Wyoming court quoted from *Blashfield's Cyclopedia of Automobile Law.* A subsequent edition of the same work contains substantially the statement quoted by the Wyoming court to the effect that ordinarily the motorist has a right to assume that the driver of a vehicle coming from the opposite direction will obey the law and to act upon such assumption in determining his own manner of using the road. This general statement, however, is followed by this exception:

"These assumptions may not be indulged in however, after he sees or ought to see, from the situation of the cars or highway or the conduct of the approaching driver, that they are unwarranted. In other words, the duty of any automobile driver, who is on the right side of the street, to stop or take other precautions to avoid a collision with an approaching vehicle, only arises when by due care he discovers that another on the wrong side of the street cannot or will not himself turn to the right to clear his way." (Vol. 2, Par. 919, pp. 62-3).

There are many cases in support of this rule, including the following:

Kapla v. Lehti, (Minn. 1948) 30 N.W. (2d) 685, in which the court said:

> "In numerous of our decisions we have held that the driver of an automobile on his own right side of the road must exercise due care to avoid collisions with other vehicles, even with those on his side of the road, and that, while he may assume that an approaching vehicle on his side of the road will turn and get on its right side, he will not be permitted to act on the assumption where the factual basis for it has disappeared, as, for example, where it becomes apparent that the driver on the wrong side of the street either will not or cannot turn back to his right side." (p. 691)

Hoke v. Atlantic Greyhound Corporation, (N.C. 1947) 42 S. E. (2d) 593:

> "However, the right of a motorist to assume that a driver of a vehicle coming from the opposite direction will obey the law and yield one half of the highway, or turn out in time to avoid collision, and to act on such assumption in determining his own manner of using the road, is not absolute. It may be qualified by the particular circumstances existing at the time, —such as 'the proximity, position and movement of the other vehicle and the condition of the road as to the usable width and the like.' (citing cases)
>
> "Moreover, notwithstanding the right of a motorist to so assume still this does not lessen his duty to conform to the requirement of exercising due care under the existing circumstances, that is, to conform to the rule of the reasonably prudent man." (p. 597)

Williams v. Brown, (La. 1937) 181 So. 679:

> "It is true, as is said by Blashfield, that a motorist has the right to assume that one approaching him will hold his side of the road, or, if not entirely thereon, will regain it in time to avoid a collision, but this rule, as is also said by him, is not without its exceptions. If the motorist from all appearances, has good reason to believe that the operator

of the approaching car does not realize the perilous situation he has created and is continuing or, from the situation in a general way, has no reasonable ground upon which to assume that such operator will timely resume travel on his side of the road, it devolves upon him to exercise all due diligence and precaution and to take such action as will avoid an emergency and avert the impending accident." (p. 682)

Gray v. St. Johnsbury Trucking Co., (Vt. 1949) 68 A (2d) 697:

"The truck driver had the right to assume that the bus driver would observe the law and seasonably move over to his own side of the highway so as to pass without interference and the truck driver had the right to proceed on that assumption until he saw, or in the circumstances ought to have seen, that it was unwarranted. But such an assumption must not be persisted in after the actor knows facts showing that it will not be true. Hatch v. Daniels, 96 Vt. 89, 94, 117 A. 105. So when the truck driver saw, or ought to have seen, that the bus driver would not get out of the way, he was bound to exercise the care of a prudent man to avoid injuring the plaintiff's intestate. Whether he did so under the facts prevailing here was for the jury to decide." (p. 698)

It is of course well settled that to defeat recovery on the ground of contributory negligence, it is not necessary that plaintiff's negligence be the sole proximate cause of the accident. This rule is well stated in *Blashfield's Cyclopedia of Automobile Law and Practice*, Vol. 4, Par. 2553, page 52, as follows:

"The converse of the above rule is also true: to defeat recovery on the ground of contributory negligence, it is not necessary that the negligence should be the sole proximate cause of the accident, but it is sufficient if it proximately contributed in any degree to the accident, or so contributed to the accident that but for such negligence the accident would not have occurred."

Had it not been for the contributory negligence of plaintiff this accident would not have occurred. Plaintiff first observed

defendant's truck swerve to the east side of the highway and could see the danger ahead when they were at least 850 feet apart. He observed defendant's vehicle completely out of control when they were some 400 feet apart. He was aware of the extremely icy and dangerous condition of the highway over which he had traveled for more than nine miles. Had he been traveling at a proper rate of speed in view of the condition of the highway and had he exercised proper control in slowing down and bringing his vehicle to a stop after observing the dangerous situation confronting both drivers, there would have been no collision and plaintiff would not have sustained his injuries. Instead plaintiff under his own testimony and that of his own witnesses was traveling from 15 to 25 miles an hour when the collision occurred.

After defendant's truck started to skid and particularly after it went completely out of control, plaintiff could have avoided the accident except for his excessive speed and his failure to use due diligence in operating his bus after observing defendant's truck in a dangerous position. Such negligence was clearly a proximate cause of the accident.

APPELLANT'S INFERENCES OF ERROR NOT JUSTIFIED

As stated above, Appellant's Brief presents little to support the contention that there was no evidence to sustain the court's findings. Instead counsel rely upon inferences which are not supported by the record and suggest: (1) that the court "applied the wrong legal standards of care to the conduct of plaintiff," and (2) that the trial judge "voiced uncertainty as to the correctness of his decision."

1. Legal Standards of Care Applicable to Plaintiff's Conduct.

In support of their first suggestion, counsel refer repeatedly to the so-called Hennessy cases involving actions for the death of two passengers in the bus. They take, out of context, an excerpt from the court's decision calling attention to plaintiff's knowledge, among other things, that care and caution would be required to insure the safety of his passengers. The court is not there speaking of any legal standard or degree of care. In the findings of fact the court expressly found that "plaintiff did not exercise ordinary care" in the particulars therein specified (Finding XI, R. p. 35). There is no basis for any inference that the court did not fully appreciate the distinction between the degree of care required with respect to passengers and that required with respect to plaintiff's own safety.

It is absurd to assume that a distinguished jurist of the ability of the trial court, with more than twenty-five years experience as a Judge of the Federal District Court, would fail to appreciate and apply a distinction so elementary.

It should be noted also that after the trial of this action a transcript of the evidence was prepared and briefs were filed before the court's decision. The decision itself shows the careful attention given to the case by the trial court. There was oral argument on the motion for new trial, followed again by the filing of briefs by counsel for the respective parties, "all of which," the court states in the order denying the motion, "were presented to the court in an able manner and with an exhaustive discussion of the fact situation and review of many of the law points heretofore submitted" (R. p. 41).

While none of the trial briefs are before this court, it may

be safely assumed that the able counsel for appellant did not overlook a full presentation of the legal standards applicable to the conduct of plaintiff. Any inference that the court might have been confused on this point is without foundation.

2. No Basis for Suggestion of Doubt in Mind of Trial Court.

Appellant's counsel finally contend that the trial court was uncertain and in doubt with respect to the correctness of his decision. We respectfully submit that a careful reading of the original decision and the order denying the motion for new trial in their entirety reflect no doubt or uncertainty in the mind of the trial court. It is true the court suggested in the original decision that if he had committed error, this tribunal would find and apply the correct solution; and in the order denying motion for new trial stated that whether the trial court was correct would not be known until a review could be had by higher authority. This latter statement, however, followed immediately after the court's statement that he had "been unable to find any new matter of sufficient importance to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered." (R. p. 42). The comments of the trial court quoted in Appellant's Brief are not in any sense an expression of doubt, but rather a recognition by the court "of his serious duty to determine the responsibility for this tragic occurrence by resolving the evidence and attending circumstances to the best of his judgment and ability." (R. p. 29). Reading the italicized portion quoted in Appellant's Brief (p. 13) with the remainder of the paragraph suggests an understandable concern on the part of the trial court in reaching a correct conclusion, particularly in view of the serious nature of plaintiff's

injuries. The entire decision leaves no doubt, however, that it was based upon a most careful and conscientious consideration of all of the evidence and legal principles applicable to the case and that such consideration impelled a finding of negligence on the part of the plaintiff.

We agree with counsel for appellant that the trial court must be presumed to have had full knowledge of the well established rules applicable to appeals to the circuit court of appeals and that the rules are correctly stated in Appellant's Brief (pp. 19-20). These rules were specifically recognized by this court in the case of *Ocean Accident & Guaranty Corporation v. Rubin*, 73 F. (2d) 157, where the court said in part:

> "At the outset, it must be remembered that: 'Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley v. Supervisors,* 121 U. S. 547, 7 S. Ct. 1234, 30 L. Ed. 1000, 1002.'
>
> "*Dooley v. Pease,* 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457.
>
> "In the Dooley case, supra, the court continued: 'Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals or by this court, if there was any evidence upon which such findings could be made. (Cases cited.)'
>
> "Citing the Dooley Case, supra, with approval, the Supreme Court reaffirmed the foregoing rule in the case of *United States v. Jefferson Electric Mfg. Co.*, 291 U. S. 386, 407, 54 S. Ct. 443, 78 L. Ed. 859, decided February 12, 1934." (p. 163)

With the trial court appreciating the effect of the foregoing rules and having on motion for new trial carefully considered "the facts, authorities, and arguments presented, which was also done by the court after the trial on the merits" (R. p. 41-2),

it must be assumed that the motion would have been granted had there been doubt in the court's own mind that his decision was correct. On the contrary the court expressly states that nothing was presented in connection with the motion for new trial "to cast doubt on the correctness of the decision, findings and conclusions heretofore rendered in said cause." (R. p. 42).

CONCLUSION

1. The evidence fully supports the court's findings that plaintiff did not exercise ordinary care on his part in the following particulars:

> "(a) While approaching the point of collision plaintiff did not have the bus he was driving under proper control and drove the same without due caution and at an excessive rate of speed in view of the hazards which existed by reason of the slippery condition of the highway.
>
> "(b) Plaintiff did not maintain a proper lookout when approaching the point of collision, when had he looked he could have observed defendants' truck out of control on the highway and could have stopped the bus he was driving and avoided said collision.
>
> "(c) Plaintiff failed to slow down or slacken the speed of the bus he was driving and bring the same under proper control when the approaching truck of the defendant was in plain sight and it appeared likely the vehicles would meet at or near said bridge."
>
> (Finding XI, R. pp. 35, 36.)

2. Each and all of the foregoing acts of negligence of plaintiff was a proximate cause of the collision, without which the collision would not have occurred.

3. There is no basis for appellant's inferences that the trial court did not apply the proper legal standards or was in doubt with respect to the correctness of the decision. On the contrary, it is clear that the court applied to plaintiff's conduct the correct

legal standard of "ordinary care;" and that the court's decision reflects a careful and conscientious consideration and analysis of all of the evidence and legal principles, impelling in the mind of the trial court the conclusion that plaintiff was guilty of negligence and that such negligence was a proximate cause of the collision.

Respectfully submitted,

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